

BILL LOCKYER, Attorney General  
of the State of California  
RICHARD FRANK,  
Chief Assistant Attorney General  
MORRIS BEATUS,  
Acting Assistant Attorney General  
KEN ALEX, State Bar No. 111236  
Supervising Deputy Attorney General  
DAMON M. CONNOLLY, State Bar No. 139779  
Supervising Deputy Attorney General  
1515 Clay Street  
P.O. Box 70550  
Oakland, CA 94612-1413

Robin Leslie Stewart, State Bar No. 068241  
Bruce A. Scheidt, State Bar No. 155088  
Gregory J. Fisher, State Bar No. 198004  
KRÖNICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation  
400 Capitol Mall, 27th Floor  
Sacramento, California 95814-4416

Attorneys for People of the State of California  
ex rel. Bill Lockyer, Attorney General

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*  
BILL LOCKYER, ATTORNEY GENERAL,

Plaintiffs,

v.

POWEREX CORP., a Canadian corporation, and  
DOES 1-100,

Defendants.

Case No.: CGC-02-406462

**COMPLAINT FOR CIVIL  
PENALTIES (BUSINESS AND  
PROFESSIONS CODE § 17200)**

The People of the State of California, *ex rel.* Bill Lockyer, Attorney General, allege the  
following on information and belief:

1 **I. INTRODUCTION**

2 1. In January, 2001, the Governor of the State of California declared a state of  
3 emergency because of the energy crisis in the State. Skyrocketing electricity prices and supply  
4 shortages resulted in widespread blackouts, utility bankruptcy, and massive economic upheaval.  
5 Defendant Powerex Corp. (formerly known as British Columbia Power Exchange Corporation,  
6 hereafter "Powerex"), through unjust, unreasonable, and illegal overcharges and price gouging  
7 received unprecedented profits at the expense of consumers, ratepayers, businesses, and the State  
8 of California. Powerex's profiteering and other unlawful and unfair business practices resulted in  
9 hundreds of millions of dollars of overcharges and illegal profits.

10 2. This action, under section 17200 of the Business and Professions Code, based on  
11 unlawful rates charged by Powerex, seeks to redress those wrongs. Each and every one of the  
12 thousands of unjust and unreasonable rates charged by Powerex was an act of unfair competition,  
13 subject to civil penalties. In addition, each of the tens of thousands of rates charged by Powerex,  
14 but not filed with the Federal Energy Regulatory Commission ("FERC"), was an act of unfair  
15 competition subject to civil penalties.

16 **II. PARTIES**

17 3. Plaintiffs are the People of the State of California, ex rel. Attorney General of  
18 California, Bill Lockyer. Business and Professions Code section 17200 provides that actions to  
19 prohibit any unfair and unlawful business practices or acts may be brought by the Attorney  
20 General in the name of the People of the State of California.

21 4. Defendant Powerex Corp. is a British Columbia, Canada corporation that, at all  
22 relevant times, marketed and sold electricity in the California markets.

23 5. The true names and capacities of defendants stated in this Complaint under the  
24 fictitious names of Does 1 through 100, inclusive, are unknown to plaintiffs, who sue such  
25 defendants by such fictitious names. Each of the fictitiously named defendants is responsible in  
26 some manner for acts, occurrences, or omissions which caused the violations of law alleged  
27 herein.

1           6.       Unless otherwise alleged, whenever reference is made in this Complaint to any act  
2 of the defendants, such allegation shall mean that each defendant acted individually and jointly  
3 with the other defendants named in the Complaint.

4           7.       Unless otherwise alleged, whenever reference is made in this Complaint to any act  
5 of any corporate or other business defendant, such allegation shall mean that such corporation or  
6 other business defendant did the acts alleged in this Complaint through its officers, directors,  
7 employees, agents, and/or representatives while they were acting within the actual or ostensible  
8 scope of their authority.

9           8.       At all relevant times alleged in this Complaint, each of the defendants has acted as  
10 an agent, representative, or employee of each of the other defendants and has acted within the  
11 course and scope of said agency or representation.

### 12 **III.     JURISDICTION AND VENUE**

13           9.       This Court has jurisdiction pursuant to California Constitution Article VI, section  
14 10, because this case is a cause not given by statute to other trial courts.

15           10.      This Court has jurisdiction over the defendants named above because they do  
16 sufficient business in California, or otherwise have sufficient minimum contacts in California to  
17 render the exercise of jurisdiction over them by the California courts consistent with traditional  
18 notions of fair play and substantial justice.

19           11.      Venue is proper in this Court because the cause arises in the City and County of  
20 San Francisco where some of the violations of law have occurred.

### 21 **IV.     STATUTORY BACKGROUND**

#### 22 **A.     The Unfair Competition Act**

23           12.      California Business and Professions Code section 17200 provides that "unfair  
24 competition shall mean and include unlawful, unfair or fraudulent business practice." Section  
25 17203 of the Business and Professions Code provides that "(a)ny person performing or proposing  
26 to perform an act of unfair competition within this state may be enjoined in any court of  
27 competent jurisdiction."

28           13.      Section 17206(a) provides that any person violating Section 17200 "shall be liable

1 for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,  
2 which shall be assessed and recovered in a civil action brought in the name of the people of the  
3 State of California by the Attorney General or by any district attorney." Under section 17205,  
4 these penalties are "cumulative to each other and to the remedies or penalties available under all  
5 other laws of this state."

6 **B. The Federal Power Act**

7 14. The Federal Power Act ("FPA"), 16 U.S.C. §§ 824 et seq., governs sales of  
8 wholesale electricity. Under the FPA, all rates and charges, changes to rates, and all contracts  
9 must be filed with FERC. 16 U.S.C. § 824d. In addition, all rates and charges made, demanded,  
10 or received for wholesale electricity must be just and reasonable, and any rate or charge that is not  
11 just and reasonable is unlawful. 16 U.S.C. § 824d(a).

12 **V. FACTS**

13 **A. Deregulation of the California Electricity Market**

14 15. In 1996, the State of California enacted AB 1890, codified in the Public Utilities  
15 Code, to restructure the California electricity market. AB 1890, inter alia, required California's  
16 investor owned utilities, Pacific Gas & Electric Co. ("PG&E"), Southern California Edison Co.  
17 ("SCE"), and San Diego Gas & Electric Co. ("SDG&E"), to sell much of their electric generation  
18 capacity in order to create competition in the generation and sale of wholesale electricity in  
19 California.

20 16. AB 1890 also established two new institutions: the California Power Exchange  
21 ("PX") and the California Independent Systems Operator ("ISO"). The PX was established under  
22 state law to operate a market for the purchase and sale of electricity for delivery during the same  
23 or next day. The ISO was established under state law to manage the transmission network,  
24 procure electricity during actual operation ("real-time") in order to manage imbalances between  
25 demand and supply as they occur, and to maintain the reliability of the transmission grid. The  
26 purchases and sales of electricity in the markets administered by the PX and ISO are for  
27 subsequent retail resale (to customers of the investor owned utilities, primarily). Sales of  
28 wholesale electricity also occur outside of the PX and ISO markets.

1           17.     The Federal Power Act grants FERC exclusive jurisdiction over wholesale sales of  
2 electricity. 16 U.S.C. § 824. The creation and operation of the PX and ISO were approved by  
3 FERC because of the role of the PX and ISO in wholesale electricity sales. Thus, the PX and ISO  
4 are governed in part by tariffs filed with FERC and in part by state law. Bilateral out of market  
5 sales of wholesale electricity are also regulated, in theory, by FERC and the FPA.

6     **B.     Operation of the California Electricity Markets**

7           18.     The investor owned utilities are responsible for providing electricity to retail  
8 customers (homes, businesses, industry). Before California began purchasing wholesale  
9 electricity, the investor owned utilities, to the extent their own generation was insufficient to  
10 supply all of the needs of their retail customers, purchased wholesale energy from generators  
11 such as Powerex for resale, and made those purchases through both the PX and ISO markets.  
12 Both the utilities and the generators are connected to the State's electricity grid, which is  
13 managed by the ISO. Because of the nature of electricity (and the fact that it cannot be stored  
14 once generated), the operation of the grid and balancing of supply and demand is a highly  
15 complex operation. As a result, operation of the grid requires, inter alia, both electricity and  
16 ancillary services.

17          19.     Substantial portions of the electricity requirements for any given day were  
18 scheduled through the PX in conjunction with the ISO. The ISO was also able to procure real-  
19 time energy as needed. These markets operate in one-hour increments (and even in ten-minute  
20 increments), requiring bidding, sales, and purchases for each hour or ten-minute increment.  
21 Ancillary services are separate markets operated by the ISO for the delivery of electricity on  
22 demand. Generators bid into ancillary services markets and, when their bids are accepted, agree  
23 to provide electricity if the ISO determines, through the operation of the grid, that the electricity  
24 is needed. There are a series of different ancillary services markets that are used by the ISO to  
25 provide slightly different services.

26          20.     Before declaring bankruptcy and ceasing operations as a result of the energy crisis,  
27 the PX operated two electricity markets: the day-ahead market for delivery the next day, and the  
28 day-of market for delivery the same day. While it was operating, the PX scheduled the majority

of electricity in the State (through the ISO as the operator of the grid).

21. While demand for electricity may be reasonably forecast for any given day, the forecast is never exact. As a result, every day, the ISO must supplement the day-ahead and day-of electricity with real time and ancillary services electricity.

22. The ISO does not buy and sell electricity for its own account. As part of its market functions, it assigns costs and payments to market participants based on sales and purchases in the various real time and ancillary services markets that the ISO administers.

23. Entities also buy and sell wholesale electricity in bilateral out of market deals. These deals can and do impact market prices and supplies.

24. In theory, through the interaction of these various markets and out of market sales, electricity supply and demand remain in check, and the ISO can operate the grid with reliability. The theory did not come to fruition in California.

### **C. Breakdown of Market and Skyrocketing Prices**

25. For a number of reasons, including limited supply of natural gas and possible manipulation of supply by generators of electricity, the wholesale price of electricity increased dramatically in California in the summer of 2000. The massive price increases and the drop in supply resulted in blackouts and massive economic upheaval in the state.

26. On January 17, 2001, Governor Davis declared a state of emergency because of the energy crisis. The State suffered repeated rolling blackouts, was subject to two months of stage 3 electricity emergencies requiring reduced usage, and ratepayers were hit with massive increases in retail electricity charges.

27. The two primary investor owned utilities, which each had upstreamed billions of dollars to their parent companies, were subject to retail price caps and were limited in the amount of revenues they could raise from ratepayers. As a result, both SCE and PG&E incurred enormous debt and defaulted on payments to both the PX and the ISO. PG&E declared bankruptcy. The State, as the only available creditworthy buyer, spent billions of dollars purchasing electricity to keep the lights on in California.

28. On December 14, 2000, the Department of Energy ordered out-of-state suppliers

1 to deliver power to California. FERC also ordered both soft and hard price caps in an attempt to  
2 control prices charged by generators for electricity in the State.

3 29. Prices for wholesale electricity soared. In 1999, California paid approximately \$7  
4 billion for electricity. In 2000 and 2001, Californians paid approximately \$27 billion for  
5 approximately the same quantity of electricity.

6 30. Meanwhile, generators of electricity, including Powerex, enjoyed massive, historic  
7 profits.

#### 8 **D. FERC's Determination of Unjust, Unreasonable, Unlawful Prices**

9 31. In a November 1, 2000 order (and repeated and reaffirmed in orders dated April  
10 19, 2001, July 25, 2001, and December 19, 2001), FERC found that the "electric market structure  
11 and market rules for wholesale sales of electric energy in California were seriously flawed and that  
12 these structures and rules, in conjunction with an imbalance of supply and demand in California,  
13 have caused, and continue to have the potential to cause, unjust and unreasonable rates for short-  
14 term energy. . . ." *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000).

15 32. The FPA, at 16 U.S.C. § 824d(a), declares unlawful any unjust and unreasonable  
16 rate or charge for wholesale electricity.

17 33. In its July 25, 2001 and December 19, 2001 Orders (and in a refund proceeding  
18 currently before FERC), FERC determined a formula for the maximum just and reasonable price,  
19 based on the heat rate of any particular generating unit times the gas price plus six dollars times  
20 1.1. All charges above the formula rate are unjust and unreasonable.

21 34. Based on the FERC formula and the calculation done by the ISO, Powerex has  
22 exceeded the just and reasonable price on tens of thousands of separate occasions, in violation of  
23 16 U.S.C. § 824d.

#### 24 **E. Powerex's Actions and Profits**

25 35. Through its scheduling coordinators, Powerex sold electricity into the California  
26 markets. It operated in all of the markets, including day-ahead, hour-ahead, real-time, and  
27 ancillary services. It made tens of thousands of electricity transactions in those markets starting in  
28 before 1998 and continuing through 2002.

36 Under the FPA, all rates and charges, all changes to rates and charges, and all contracts must be filed with FERC. 16 U.S.C. § 824d; 18 C.F.R. § 35.1.

37. Since 1998, Powerex has entered into at tens of thousands of separate transactions for the sale of wholesale electricity.

38. Powerex has never filed its rates, charges, changes to rates and charges, or its contracts with FERC. Instead, it filed a statement with FERC that it will charge rates as agreed upon by Powerex and the purchaser. In addition, Powerex files quarterly summaries of sales (with limited information) after the fact. Powerex's failure to file rates as required by the FPA deprived the public, power purchases, ratepayers, and FERC of notice and information necessary to make informed decisions about rates.

39. Regardless of whether Powerex withheld supply of electricity, exercised market power, or manipulated the price of electricity or the electricity markets in any other way, Powerex charged rates in the California electricity markets that were unjust, unreasonable, and therefore illegal, and did so on tens of thousands of occasions starting in early 2000 and continuing through 2001. And on tens of thousands of occasions, it failed to file the rates it charged, in violation of 16 U.S.C. § 824d and 18 C.F.R. § 35.1.

### FIRST CAUSE OF ACTION

## UNFAIR BUSINESS COMPETITION

**(Business and Professions Code § 17200 et seq.)**

40. Paragraphs 1 through 39 are realleged and incorporated as if fully set forth herein.

41. Beginning on an exact date unknown to plaintiff, but within four years preceding the filing of this complaint, defendants have engaged in acts of unfair competition as defined in Business and Professions Code section 17200, as follows: Each and every sale or purchase of wholesale electricity by defendants for which defendants failed to file the charge, rate, price or contract reflecting the terms of the sale or purchase, as required by the Federal Power Act, FPA regulations, and FERC orders setting forth filing requirements. The number of such sales or purchases is in the hundreds of thousands;

42. Said violations render defendant liable to plaintiff for civil penalties of up to \$2,500



1 per day for each violation, and other equitable relief as appropriate.

2 **SECOND CAUSE OF ACTION**

3 **UNFAIR BUSINESS COMPETITION**

4 **(Business and Professions Code § 17200 et seq.)**

5 43. Paragraphs 1 through 42 are realleged and incorporated as if fully set forth herein.

6 44. Beginning on an exact date unknown to plaintiff, but within four years preceding  
7 the filing of this complaint, defendants have engaged in acts of unfair competition as defined in  
8 Business and Professions Code section 17200, as follows: Each and every rate, charge, or price  
9 charged by defendants in violation of the Federal Power Act, 16 U.S.C § 824d(a), as unfair,  
10 unreasonable, and therefore unlawful;

11 45. Said violations render defendant liable to plaintiff for civil penalties of up to \$2,500  
12 per day for each violation, and other equitable relief as appropriate.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, plaintiffs pray that the Court:

- 15 1. Award civil penalties according to proof;
- 16 2. Award plaintiffs their costs of suit;
- 17 3. Award plaintiffs attorneys fees;
- 18 4. Grant such other and further relief as the court deems just and proper.

19 Dated: April 9, 2002

Respectfully submitted,

20 BILL LOCKYER, Attorney General  
of the State of California  
21 RICHARD M. FRANK  
Chief Assistant Attorney General  
22 MORRIS BEATUS  
Acting Assistant Attorney General  
23 KEN ALEX  
Supervising Deputy Attorney General  
24

25 By: DAMON M. CONNOLLY  
Supervising Deputy Attorney General

26 Attorneys for the People of the State of California,  
27 *ex rel.* Bill Lockyer, Attorney General  
28